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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SEACLIFF PACKAGING, INC.,

Plaintiff, Cross-defendant and  
Respondent,

v.

LARINA LEE,

Defendant, Cross-complainant and  
Appellant.

G039646

(Super. Ct. No. 06CC09917)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James P.  
Gray, Judge. Affirmed.

Terran T. Steinhart for Defendant and Appellant.

Ross & Wersching, Alan G. Ross and Eric J. Wersching for Plaintiff and  
Respondent.

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Seacliff Packaging, Inc. (Seacliff) sued its former employee, Larina Lee (Lee), for fraud, breach of contract and breach of fiduciary duty based on her performance as its sales representative. Seacliff claimed Lee sold competing products through her own company to Seacliff's customers and made wrongful profits from sales on behalf of Seacliff by overstating the cost of goods and pocketing the difference. Lee cross-complained against Seacliff for failure to pay her commissions. The jury found in favor of Seacliff and awarded it compensatory damages of \$744,000 and punitive damages of \$125,000. Lee appeals, claiming there is insufficient evidence to support the judgment, the trial court erred in admitting certain evidence, her motion for new trial should have been granted on the grounds of newly discovered evidence and excessive punitive damages, and she should have recovered unpaid commissions on her cross-complaint. We affirm the judgment.

#### FACTS

Seacliff is a company that distributes packaging items and accessories for skin and hair care products. Lee was hired as an outside sales person to service certain customers by filling their packaging needs. Her duties included assessing the customers' interests and showing them various choices of packaging. She would then "source" the product by finding a manufacturer at the best possible price. Seacliff would then sell the products to the customers at a higher price.

Seacliff paid Lee a base salary of \$90,000 per year and a 15 percent commission on the gross profits of completed sales. Scott Simon, one of the owners of Seacliff, testified they paid Lee more than the other outside sales person at that time because she "promised that she would be exclusive to Seacliff" and "she had some experience in the cosmetic industry and also, she spoke Korean and it gave us a way to broaden our spectrum, as far as vendors that were [A]sian based in Korea."

Simon testified Seaclyff paid Lee through her corporation, Anahi, Inc., because she wanted to be paid as an independent contractor for tax purposes. “[S]he also said that she could get the best quotes if we paid a corporation that she formed, because then she could represent herself to the manufacturers in Korea as a Korean. She stressed that if we went to Korea, being Seaclyff, they would charge us a lot more money knowing that we were basically an American-based company . . . .”

Lee was employed by Seaclyff for 13 months, from July 1, 2005 through July 31, 2006. She was assigned three customers: Arbonne International, Inc., Youngblood Mineral Cosmetics, and PATH. Lee told Seaclyff it was necessary to set up brokers in Korea, with whom Seaclyff could place orders for the needed items. She did so, and the brokers bought the items from the manufacturers, sold them to Seaclyff, and Seaclyff then sold them to the customer. Simon testified, “Seaclyff had an agreement with the [S]outh Korean brokers that we would pay an 8 percent markup from manufacturer to the broker.”

In July 2006, Simon discovered at a trade show that he could buy the Kabuki brush that Seaclyff was selling to Arbonne directly from the manufacturer, Bando Brushes, at a significant savings rather than buying it through a Korean broker. He told Lee about his discovery at a meeting between them on July 27. Because the increased savings would result in increased gross profits, and thus increased commissions for Lee, Simon expected her to be happy about the news. Instead, Lee “stormed out of the office” and, two days later, resigned. Shortly after, Simon talked to one of the Korean brokers, Sierra M., and “realized that there was something going on here . . . [.] I then contacted the manufacturer direct, and we – from that point forward, we started doing business direct to the manufacturers.”

After Simon cancelled the Arbonne order with the broker, he went to Bando Brushes and got the Kabuki brushes cheaper. Kabuki brushes were \$1.62 apiece

through the broker, and were now \$1.10. Pump bottles were \$1.32 apiece through the Korean broker, and were now \$1.01

Simon testified that Seaclyff's damages from Lee's conduct was "about 1.1 million dollars." "[B]y doing extensive research and figuring out what we were paying and what we're paying now, I come out with about a 30 percent difference, we're paying about 30 percent less now for products from Korea because we're buying direct from the manufacturers, opposed to when we were buying through the Korean brokers." Simon explained this was not 30 percent of sales, but 30 percent of the cost of goods.

Lee admitted she set up a competing company, Ayuri, Inc., and sold items through it to Seaclyff's customers. She authenticated purchase orders showing her company's sales to Youngblood in the total amount of \$274,155. The parties jointly engaged a forensic certified public accountant, William Mowrey, Jr., who prepared an exhibit from the parties' financial records. The exhibit showed that during the thirteen months of Lee's employment, Seaclyff sold products to Youngblood, Arbonne, and PATH for \$2,761,345. Lee sourced the products for \$2,393,969, which resulted in a gross profit of \$55,106. Seaclyff's average gross profit margin during this period was 8.9 percent.

On Seaclyff's complaint, the jury found that Lee agreed to work exclusively for Seaclyff and to give it the best prices she could obtain from the manufacturers. It found she breached this agreement and her fiduciary duty to Seaclyff by distributing or selling cosmetic packaging or accessories through entities other than Seaclyff and thereby making profits over and above that paid to her by Seaclyff. The jury found Lee falsely represented to Seaclyff that she would work exclusively for it, with the intent to induce Seaclyff to pay her \$90,000 per year plus commissions and expense reimbursements. It found Seaclyff was damaged in the amount of \$744,000.

On Lee's cross-complaint against Seaclyff, the jury found Seaclyff did not breach its agreement to pay commissions to Lee and it did not wrongfully interfere with Lee's relationship with Arbonne or Youngblood. The jury found that Seaclyff made derogatory statements about Lee to others, but that the statements were true. Accordingly, the jury awarded no damages against Seaclyff.

## DISCUSSION

### *Substantial Evidence to Support Damages for Lost Profits*

Lee contends Seaclyff failed to present evidence from which the amount of its damages could reasonably be computed and therefore the jury based its award on improper speculation and conjecture. Lee argues Seaclyff could not prove its lost profits without presenting evidence of its overhead expenses because a portion of that had to be subtracted from the gross profits figure to obtain net profits. Citing *Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679 and *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, Lee claims, "When loss of anticipated profits is an element of damages, it means net and not gross profits. . . ."

*Resort Video* and *Gerwin* dealt with claims for anticipated future profits the plaintiffs would have made but for the defendants' wrongful acts. Seaclyff did not claim anticipated profits. Rather, Seaclyff claimed damages from past transactions by paying more than the promised lowest price to obtain the products from the manufacturers. These purchases by Seaclyff were arranged by Lee and were well documented by purchase orders and invoices.

Seaclyff's damages were equal to the amount by which it was overcharged. Its overhead expenses were irrelevant to this computation because they were incurred in the same amount whether Seaclyff was overcharged or not. In other words, Seaclyff's cost to process the purchases from the manufacturer and distribute the products to the customers was a constant figure.

Damages can be an approximation if some reasonable basis for computation is available. (*Israel v. Campbell* (1958) 163 Cal.App.2d 806, 816.) The jury had evidence that the total cost of goods for Lee's three customers was approximately \$2,400,000. It also had evidence that the cost of goods would have been approximately 30 percent less, or \$1,680,000, if Lee had not breached her obligations to Seacliff. Thus, the jury could calculate Seacliff's lost profits as approximately \$720,000.

*Substantial Evidence of Damages for Wrongful Profits from Competing Sales*

Lee also contends the damages awarded for the sales through her own company to Seacliff's customer Youngblood were based on improper speculation and conjecture. We disagree.

Lee sold the same items to Youngblood through her own company that Seacliff had been selling to Youngblood. The evidence showed that Lee's sales to Youngblood while she worked for Seacliff totaled \$274,155. The evidence also showed that Seacliff's profit margin for sales to various customers, including Youngblood, during the same period was 8.9 percent. This provided a reasonable basis for the jury to calculate that Lee's wrongful profits from her sales to Youngblood were approximately \$24,000. (*Israel v. Campbell, supra*, 163 Cal.App.2d at p. 816.)

Lee again complains that Seacliff can only recover net profits, not gross profits. Arguing that Seacliff would have had to pay her a 15 percent commission on the \$24,000 profit it would have made, she asserts that amount has to be subtracted from the gross profit and the damages for the Youngblood sales can be no more than \$20,400. But Lee misunderstands the nature of the damage award. The jury found Lee made wrongful profits by selling to Youngblood through her own company and that those profits rightfully belonged to Seacliff. The damage award was not Seacliff's lost profits, but the amount of Lee's wrongful profits.

*Evidence re Cost of Purchasing Directly from the Manufacturer*

Lee contends the trial court erred in admitting Seaclyff's evidence that it purchased brushes and pumps at reduced prices from the manufacturers because the time at which it did so was one to two years after it purchased the items from Lee's broker. Lee argues this evidence is irrelevant and insufficient to prove that the prices Lee provided were not the best obtainable at the time they were sourced.

Seaclyff argues Lee's challenge to the admissibility of the evidence is waived because she failed to object on relevance grounds at trial. Seaclyff is not entirely correct.

Seaclyff introduced an exhibit showing it paid the Korean broker \$1.62 for each Kabuki brush. When Seaclyff's counsel asked Simon, "Do you know what you're now paying for these same products?" Lee's counsel objected to the question as irrelevant. The objection was overruled, and Simon answered, "One dollar and 10 cents." Then Seaclyff introduced evidence, without objection, that it paid the Korean broker \$1.32 for each airless pump bottle and "now" paid \$1.01. Seaclyff's counsel asked Simon, "When did you start paying a dollar-1 apiece for these [pumps]?" He replied, "When we went direct to the manufacturer, instead of going through the broker, Sierra M." Subsequently, Seaclyff introduced a financial report on sales that it made involving products it had purchased from the Korean brokers. After going over some of the numbers with Simon, Seaclyff asked, "What do you believe that Seaclyff's damages were as a result of Ms. Lee's conduct?" Lee's counsel objected on "foundation and speculation." The trial court overruled the objection, stating, "You may clarify on cross-examination."

Lee properly objected to the admission of Simon's testimony about the direct price of the Kabuki brushes on the grounds of relevance; thus, her challenge on appeal was not waived. We need not decide whether her objection can be construed to

apply to the testimony about the direct price of the pump bottles because even if it was not waived, the trial court was correct to overrule her objection.

“Relevant evidence includes evidence ‘having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.’ (Evid. Code, § 210.)” (*People v. Cash* (2002) 28 Cal.4th 703, 729.) The trial court has broad discretion to determine the relevancy of evidence. (*Id.* at p. 727.) “That discretion is only abused where there is a clear showing the trial court exceeded the bounds of reason, all of the circumstances being considered.” (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 32.)

Although Simon testified Seacliff was “now” paying the reduced prices for brushes obtained directly from the manufacturers, he had earlier testified Seacliff started buying pumps directly from the manufacturers shortly after Lee resigned, in July 2006. He also testified that he found a manufacturer willing to sell the Kabuki brushes for \$1.10 apiece at the time of his meeting with Lee, in July 2006. Therefore, there was evidence that Seacliff was able to obtain Kabuki brushes from the manufacturer for \$1.10 apiece and pump bottles for \$1.01 apiece in July 2006, which allowed the jury to make a direct comparison to the price it paid through Lee and the Korean brokers. The fact that Seacliff was still paying the same reduced prices at the time of trial does not diminish the relevance of Simon’s testimony.

#### *Denial of Motion for New Trial*

The trial court may grant a new trial on the basis of, inter alia, “[n]ewly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial”; and “[e]xcessive or inadequate damages.” (Code Civ. Proc., § 657, subds. (4) & (5).) Lee contends she made a showing on both these grounds that was sufficient to compel a new trial.



Lee claims she was surprised by Simon's testimony that Seaclyff purchased the same brushes and pump bottles directly from the manufacturers at a price substantially less than it was paying through the Korean brokers. After trial, she obtained the declaration of Li Hu Jie, the owner of Shenzen Xinsheng Hair Brush Products Co., Ltd. Jie declared his company manufactured Kabuki brushes for Arbonne "[f]rom late 2005 to about June 2006 . . . . [W]e worked through a Korean broker named Sierra, who would receive orders from Seaclyff . . . . [¶] For the entire time that we have been manufacturing Kabuki Brushes for Arbonne, we have been dealing exclusively with Sierra and no other person. . . . [W]e never manufactured or sold Kabuki Brushes directly to Seaclyff at any time."

Lee claims Jie's declaration qualifies as newly discovered evidence because it was willfully suppressed by Seaclyff during discovery and it directly impeaches Simon's testimony. She claims she was diligent in seeking the information during discovery because she propounded interrogatories asking Seaclyff to state facts supporting its contentions that Lee marked up the price of the products and made ill-gotten gains in the form of excess and fraudulent profits.

Lee does not meet the high degree of diligence which must be shown for a successful motion for new trial. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152.) Her general interrogatories propounded several months into the case were not enough. Lee knew about Seaclyff's purchase of the Kabuki brushes directly from the manufacturer when she resigned from Seaclyff. There is no indication she followed up on this knowledge at depositions or with more specific interrogatories later in the litigation.

Furthermore, Lee argues the newly discovered evidence is material because it would impeach Simon's testimony. Newly discovered evidence offered to impeach a

witness is not sufficient to compel a new trial. (*Lubeck v. Lopes* (1967) 254 Cal.App.2d 63, 68.)

Lee also contends she should have received a new trial because the \$125,000 punitive damage award against her was excessive. She argues there was no evidence to contradict her testimony that she had no current source of income and had a negative net worth.

The record reveals that Lee's credibility was low. There was evidence that she repeatedly lied and had filed perjured declarations. On Lee's cross-complaint against Seacliff for defamation, the jury found Seacliff's statements that Lee was a thief, untrustworthy, and dishonest were true. Although Lee testified she had no income or net worth, there was evidence that she drove a BMW, owned two houses, owned an inventory of brushes worth \$240,000, and had made sizeable amounts of money through her own company. The punitive damage award was significantly less than the compensatory damage award. On this record, a new trial was not compelled.

*Cross-complaint for Breach of Agreement to Pay Commissions*

Lee contends the undisputed evidence was that Seacliff owed her 15 percent of the gross profits from sales to the three customers assigned to her. She points out that the total amount of gross profits for those three customers on Mowrey's report was \$55,106; and she was paid only \$20,000.

In addition to Mowrey's report, the evidence also showed that Lee prepared and submitted monthly invoices to Seacliff for expenses and commissions. Simon testified that "on that commission and expense summary would be a list of expenses exactly what the expenses were for; a lot of times it listed her phone bill that we would reimburse her for. In addition to that, it would also go as far as listing the actual customer's name, which would be Arbonne, Youngblood, or PATH, purchase orders of that particular piece of business and the commissions that were due to her." After Lee

resigned, she submitted a final expense and commission summary indicating a “grand total” due and owing. Simon testified Seaclyff paid Lee the full amount for each invoice and that she never requested any additional commissions “until we sued her.”

Lee agreed that the commission invoices she submitted listed all the commissions she was entitled to from the Arbonne, Youngblood, and PATH accounts and that she was paid all amounts on her invoices. It was reasonable for the jury to find that Seaclyff had performed its obligation under the contract between it and Lee by paying her all the commissions she invoiced.

#### DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

SILLS, P. J.

WE CONCUR:

O’LEARY, J.

MOORE, J.